1992

State of Utah v. Michael McNaughton and Brent Ziegleman : Reply Brief

Utah Court of Appeals

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W. Andrew McCullough; McCullough, Jones and Ivins; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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STATE OF UTAH,	:	REPLY BRIEF
Plaintiff and Appellee,	:	
vs.	:	
MICHAEL MCNAUGHTON,	:	Case No. 920344-CA
Defendant,	:	
and	:	Priority No. 11
BRENT ZIEGLEMAN,	:	
Defendant and Appellant.	:	

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Interlocutory Appeal from Order of
Fourth District Court of Juab County

Hon. George E. Ballif

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CASES CITED

STATUTES AND RULES CITED

None

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REPLY BRIEF

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE

Appellant does not cite any additional constitutional provisions, statutes, ordinances, rules or regulations in this reply brief, and does not here rely upon any such items.

SUMMARY OF ARGUMENTS

The State has conceded that Defendant Brent Ziegleman was illegally detained by Officer Bushnell. The search made by the officer during that illegal detention is constitutionally tainted; and the evidence found must be suppressed.

POINT I

THE SEARCH MADE OF DEFENDANT'S VEHICLE WAS CONSTITUTIONALLY TAINTED; AND ANY PURPORTED CONSENT TO SEARCH WAS INVALID.

The State of Utah, in its brief, continues to contend that the initial stop of Defendant was valid, and that Defendant's constitutional rights were not violated by it. The State does, however, concede that the continued detention of Defendant and the change of the focus of that detention from speeding to car theft to drugs was a violation of Defendant's Fourth Amendment rights. Having conceded that fact, the State of Utah now asks this Court to completely ignore that illegal conduct and uphold the unlawful search that resulted from it.

Before urging the Court to ignore its illegal conduct, the State first adds a couple of additional concessions. It concedes that, under the cases of State v. Sims, 808 P.2d 141 (Utah App. 1991)cert. pending, 181 Utah Adv. Rep. 9 (October 4, 1991) and State v. Park, 810 P.2d 456 (Utah App. 1991) cert. denied, 827 P.2d 327 (Utah 1991) the consent to search relied upon by the State would be inadequate. The State then sidesteps or ignores the additional authority cited by Defendant in his original brief, and contends that a recent Utah Supreme Court case, State v. Thurman, 203 Utah Adv. Rep. 18 (Utah 1993) sweeps away all of Defendant's supporting authority. This, of course, is simply not true. First

of all, it is significant that the Utah Supreme Court denied cert. on State v. Park, see 827 P.2d 327 (Utah, 1991). Secondly, it is even more significant that State v. Sims, is a companion case to the Utah Supreme Court case of Sims v. Utah State Tax Commission, 198 Utah Adv. Rep. 5 (Utah, 1992). In that case, already briefly referred to in Defendant's previous brief, the Utah Supreme Court suppressed evidence ceased at an illegal road block. That decision is clearly the law of the State of Utah; and nothing appears to have happened since that decision to overrule or weaken it. State v. Sims itself has been accepted for cert, see 181 Utah Adv. Rep. 9 (Utah, 1991) and it seems highly likely that, based upon the companion case, the eventual decision will be a per curiam affirmance. The illegal detention of the Defendant in Sims is very much analogous to the illegal detention in the instant case. The Supreme Court, in reviewing that situation first determined that the roadblock where Mr. Sims was stopped was an illegal detention. In discussing the evidence obtained after that detention, the Court stated:

> Regarding the temporal proximity factor, Sims' consent was closely related in time to the initial stop. He consented during the unlawful detention with no intervening circumstances. The purpose of the roadblock was to obtain evidence of criminal violations, a purpose that does nothing to reduce the "flagrancy" of the constitutional violation it precipitated. Trooper Howard's request for consent to search Sims' vehicle was based upon the smell of alcohol, the sight of an open liquor bottle, and Sims' admission that he was carrying

> alcohol. Howard's opportunity to make these observations and to question Sims came about as a direct result of the illegal seizure. Sims did not spontaneously volunteer his consent, nor was he made aware of the fact that he could decline to consent.
>
> Given the totality of the circumstances in light of the relevant considerations, the voluntary consent in this case clearly was arrived at by exploitation of the unconstitutional roadblock. The consent did not, therefore, purge the evidence of the taint of illegality. 198 Utah Adv. Rep. at 6-7.

Nothing contained in the recent opinion cited by the State gives the indication that the Supreme Court has reversed itself on the fundamentals of the exclusionary rule in the last three months since the Sims decision was made.

The Utah Supreme Court, in the Thurman case, also did not suggest an overruling of its earlier case in State v. Arroyo, 796 P.2d 684 (Utah 1990). In that case, the Utah Supreme Court put the burden clearly on the State to prove that there was a valid consent to a search by the Defendant. In doing so, the State must prove that the consent was not "obtained by police exploitation of the prior illegality." 796 P.2d at 688. This is still the test. That was confirmed, without a doubt, by the Utah Supreme Court in the Thurman case when the Court stated:

> In sum, to find that a defendant's consent following police illegality is valid under the Fourth Amendment, the prosecution must prove (i) that the defendant's consent was given voluntarily, i.e., that the consent was the product of his or her own free will; and (ii) that the consent was not obtained by exploitation of the prior illegality, i.e., that the connection between the consent

> and the prior illegality was sufficiently attenuated that excluding the evidence would have no deterrent effect. 203 Utah Adv. Rep. at 22.

Nowhere in the State's brief does the State give any plausible argument for the fact that the consent to search obtained by Officer Bushnell was "sufficiently attenuated" from the illegal conduct of Officer Bushnell in holding Defendant for further investigation. In fact, the record is clear that everything that the officer did was directed toward one purpose: to find out why Defendant was acting "guilty" and to catch him doing something illegal. The officer was convinced, from the moment he pulled up along side Defendant's automobile, that Defendant was "guilty" and he made no apology for that decision in the suppression hearing. He made no apology for the fact that all of his conduct from that moment on was designed to catch the "guilty" person and to see that he was punished for his crime, whatever crime it might turn out to be. Defendant was stopped for that purpose, he was held for that purpose, he was questioned for that purpose, and a search was commenced for that purpose.

The facts set forth in the Thurman case show some rather outrageous behavior on the part of the police officers involved in that search. Nevertheless, the court found that there was a substantial "attenuation" between that outrageous conduct and the consent to the search, which was obtained several hours later. The

Utah Supreme Court made that decision because the actual consent to search that was at issue was made in writing, was made after repeated "Miranda warnings" and was made well after the improper police conduct. Additionally, the consent made by Mr. Thurman was to the search of a storage unit which was completely separate from the scene where the original police misconduct had occurred. In fact, the police did not appear to have any knowledge of the existence of the storage unit to which they later obtained consent to search. Not only did Mr. Thurman consent to the search of the storage unit, it is apparently he who brought the existence of the storage unit to the attention of the police; and he did it after he was warned by the police that he did not have to answer any questions without an attorney present.

None of those attenuating circumstances existed in the case of Mr. Ziegleman. Mr. Ziegleman was being held against his will while Officer Bushnell frantically searched for some evidence of some kind of crime. Unlike Mr. Thurman, no search warrant was issued at any time by any magistrate whatsoever; and that additional check on the raw power of the police did not exist.

In attempting to glide over the lack of the attenuating circumstances required by both Arroyo and Thurman, the State has referred to the Supreme Court's discussion of policy arguments. In the Thurman case, there was a substantial discussion of the reason

reason behind the exclusionary rule in Fourth Amendment cases. The Court said:

> Arroyo's primary goal was to deter the police from engaging in illegal conduct even though that conduct may be followed by a voluntary consent to the subsequent search. 203 Utah Adv. Rep. at 21.

The Thurman court, however, went on to grade the misconduct of the police officer. In discussing its grading system, the court stated:

> Where the misconduct is extreme, we will require a clean break in the chain of events between the misconduct and the consent to find the consent valid. . . . The same type of break should be required where the evidence shows that the police purposely engaged in conduct to induce a consent. Conversely, where it appears that the illegality arose as the result of negligence, the lapse of time between the misconduct and the consent and the presence of intervening events become less critical to the dissipation of the taint. 203 Utah Adv. Rep. at 22.

The State goes on to suggest that the illegality of the police officer's conduct is grounded exclusively on the decision of this Court in State v. Godina-Luna, 826 P.2d 652 (Utah App. 1992). The State therefore reasons that, because the conduct of the officer occurred prior to the decision of this Court in that case, the officer's conduct was a good faith attempt to follow the law. At worst, the State argues that the officer's illegal conduct was "arguably permissible" at the time, and that the officer was guilty of no more than negligence. Once again, this is simply not true. First of all, the officer did not have reasonable suspicion to make

the stop in the first place. The authority cited by Defendant in support of that proposition was well established in 1991 when the stop was made.

Likewise, the authority cited by Defendant to challenge the continued detention and the investigation of the alleged illegal behavior, was not new at the time of the stop. In Utah the major authority for the proposition that the type of investigation undertaken by Officer Bushnell was not legal is the case of State v. Robinson, 797 P.2d 431 (Utah App. 1990). The later case of State v. Godina-Luna is based extensively on the Robinson case; and the latter case does not break new ground. Officer Bushnell knew, or should have known, of the rules set forth by the Robinson court in dealing with the type of situation that he confronted in this matter. He could not have had a good faith belief that his wild search for something to explain the "guilty" behavior of Defendant was justified. The later decisions by this court that have continued to strike down this kind of police behavior should have come as no surprise to Officer Bushnell nor to the Attorney General of the State of Utah. The officer's behavior at the time of the stop, the detention and the search was all one tightly connected stream of behavior. There is no way that the Thurman case can be used by the officer to wriggle out of what he should have known at the time he stopped Defendant: that he could not stop or detain a

Defendant without articulable suspicion of particular criminal behavior. The Supreme Court continues to require a clean break between the illegal behavior and a search that comes out of it. There is no such break; and any consent given by Defendant to the search made by Officer Bushnell is hopelessly tainted.

The Supreme Court also clarified the standard of review of a determination as to whether the consent was voluntary and was sufficiently attenuated from the illegal conduct of the officer. That standard is that this is a question of law, and is to be reviewed for correctness (203 Utah Adv. Rep. at 26). The decision of the trial court was obviously not correct. It was made on the false assumption (conceded by the State) that the officer's conduct in detaining Defendant was lawful. Without this assumption, the Court's finding and conclusion cannot stand and must be reversed.

CONCLUSION

The evidence obtained by Officer Bushnell in this matter was illegally obtained from Defendant; and the use of the evidence should be suppressed. Therefore, the ruling of the court below denying the suppression should be reversed.

DATED this 15th day of February, 1993.

MCCULLOUGH, JONES, & IVINS

W. Andrew McCullough
Attorney for Appellant Ziegleman

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 1993, I did mail two true and correct copies of the above and foregoing Reply Brief, postage prepaid to Utah Attorney General, State Capitol Building, Room 236, Salt Lake City, Utah 84114.

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